UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	Jointly Administered
	§	
	§	

ASARCO LLC'S PREHEARING BRIEF ON THE UNITED STATES INTERNATIONAL BOUNDARY AND WATER COMMISSION (USIBWC) SITE

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I. INTRODUCTION

On December 7, 2007, this Court will estimate the claims relating to the United States International Boundary and Water Commission ("IBWC") Site (the "Site"). Unlike the typical claims in this bankruptcy, which have been filed on behalf of environmental regulatory agencies, these claims are filed on behalf of the IBWC, a governmental agency charged with operating and maintaining certain waterways near the U.S./Mexico border.

The IBWC's claim of $27,453,394 is seriously overestimated. The IBWC's claim has two components: soil (roughly $3.6 million) and groundwater (roughly $23.9 million). The issue for the soil component is what standard governs the cleanup: residential or industrial/commercial standards. The dispute over groundwater is the main dispute in this litigation because the potential cost is so great. ASARCO LLC ("ASARCO") is already addressing groundwater underneath its own property through work being done pursuant to a Texas Commission of Environmental Quality ("TCEQ") Agreed Order. *See* Exhibit D-7. Although groundwater from ASARCO's property has migrated onto the IBWC's property, no environmental agency has ordered the treatment of groundwater under the IBWC's property. In the ordinary course, ASARCO's work will address this problem. However, the IBWC may at some point be given funds to start a long-planned reconstruction project that requires extracting groundwater in the construction zone. Because the groundwater is currently contaminated, the IBWC might not be able to dispose of it without first treating it. It is this cost of treatment that the IBWC seeks in this proceeding. The principal dispute in this litigation involves the IBWC's claim that it requires an 8,000 gallon per minute treatment system – a system costing roughly $22 million and 23 times larger than is necessary according to the most recent data and common

sense.[1] For the reasons set forth below, the net present expected value of IBWC's claim should properly be estimated at $2,990,000.

II. FACTUAL BACKGROUND

The IBWC is responsible for constructing, operating, and maintaining the two-mile long American Canal – a drainage canal that the United States uses as a means of physical control and diversion of water from the Rio Grande River. The Site is located adjacent to ASARCO's Smelter in El Paso, Texas. The Site does not include the Smelter itself, but is comprised of three IBWC-owned areas: 1) the area surrounding the American Dam and Canal ("Canal"); 2) the IBWC American Dam Field Office ("Field Office"); 3) and property separating part of the Canal from the Rio Grande called the Island. The operation and maintenance of the Canal is conducted with heavy equipment maintained at the Field Office.

In 2001, the IBWC retained Montgomery Watson Harza ("MWH") to put together a conceptual design report for reconstructing portions of the Canal. MWH issued a report in 2002 (the "MWH Report") estimating the cost of rebuilding the Canal. In addition, it identified some soil samples that exceeded United States EPA screening levels.[2] It also noted that groundwater samples taken beneath the Site exceeded EPA's Maximum Contaminant Levels ("MCLs"). The IBWC contends that ASARCO is responsible for this contamination.[3] For the

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[1] The canal project probably will require groundwater treatment and the disposal of some contaminated soils. For convenience, the soils aspect of the canal project is addressed herein with the contaminated soils on the Island and Field Office.

[2] Screening levels" are levels that require further study. The actual cleanup criteria are typically called "action or "response" levels and are higher than screening levels.

[3] In 1996, ASARCO entered into an Agreed Order with the Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality or "TCEQ") (the "TCEQ Agreed Order") to conduct a remedial investigation of the Smelter in order to characterize the nature and extent of contamination at the Site. The primary focus of the TCEQ Agreed Order is corrective action to address alleged groundwater contamination. ASARCO has conducted numerous studies and cleanup projects on its property to comply with the TCEQ Agreed Order.

purposes of this proceeding only, ASARCO does not contest that it is likely the primary (although certainly not the only) source of the soil and groundwater contamination.

ASARCO has been conducting environmental studies for its Smelter property in the intervening years in accordance with the TCEQ Agreed Order. ASARCO retained a consultant, Arcadis, to assist it in designing a groundwater remedy to satisfy the TCEQ Agreed Order. Arcadis incorporated the prior environmental studies that had been conducted, such as the MWH Report, and used them to construct a groundwater model using a widely accepted software program to assist Arcadis in testing various remedies that it might propose to the TCEQ. ASARCO, with the assistance of Arcadis, has nearly completed a formal work plan identifying the final steps ASARCO proposes to take to address groundwater.

III. LEGAL BACKGROUND

In bankruptcy litigation, "the burden of proof . . . rests on different parties at different times." *In re Compass Marine Corp.*, 146 B.R. 138 (Bankr. E.D. Penn. 1992). Initially, the claimant must allege facts sufficient to support the claim. If the claimant meets this standard, the claim is "prima facie evidence of amount and validity of a claim" until a party at interest objects. *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 22 n.2 (2000). After the objecting party overcomes the presumed validity of the claim, a burden that is easily satisfied, the creditor must prove his or her claim. *In re Pacific Arts Publishing, Inc.*, 198 B.R. 319, 321 (Bankr. C.D. Cal. 1996). "The ultimate burden remains on the creditor . . . to prove the validity of its claim by a preponderance of the evidence." *Id.*; *see also In re Allegheny Int'l., Inc.*, 954 F.2d 167, 173 (3rd. Cir. 1992); *South Texas Wildhorse Desert Invs., Inc. v. Texas Commerce Bank-Rio Grande Valley, N.A.*, 349 B.R. 107 (S.D. Tex. 2004) (finding that once debtor properly objected to creditors proofs of claims, the burden was on creditors to prove up their claims by a preponderance of the evidence).

IV. ARGUMENT

The United States has asserted claims on behalf of the IBWC seeking to recover far more than ASARCO is liable for, both under applicable law and the particular facts of this case. First, the IBWC bases its claim on an outdated, preliminary and unsubstantiated water treatment estimate that cannot credibly serve as a reasonable basis for estimating the IBWC's claim. Second, the IBWC must accept that it is a potentially responsible party that contaminated its own property with hydrocarbons, among other things, and having knowingly relocated that same soil at issue here. Finally, the IBWC improperly uses a low discount rate and a cost base year of 2008 in order to increase the size of its already-inflated claims.

A. The IBWC Relies on Unrealistic Cleanup Assumptions to Inflate Its Claim

1. ASARCO's Dewatering Estimate of 350 GPM Is Far More Credible Than The IBWC's Estimate of 8,000 GPM

In the event the IBWC commences its Canal reconstruction project before ASARCO's permanent groundwater remedy cures conditions under the IBWC property, then water extracted during construction likely would require treatment. ASARCO has established that a 350 gallon per minute ("gpm") treatment system costing roughly $1.55 million would be adequate for this task. *See* Supplemental Report of Zelikson and White, p. 6 (Exhibit D-171).

ASARCO's estimate is based principally on sophisticated computer groundwater modeling for the entire Site conducted recently as part of ASARCO's ongoing compliance with the TCEQ Agreed Order. *See* Arcadis Groundwater Model Report (Exhibit D-67). ASARCO's contractor, Arcadis, used the environmental studies that have been conducted in the area to perfect a model that allows the user to predict groundwater flows throughout the area including the Site. Importantly, this groundwater model was tested and calibrated based on actual sampling to confirm that it provides the most accurate picture of hydrogeologic conditions

throughout the Site. Thus, the model, a marriage of multiple environmental studies with years of actual sampling data, provides the most robust and reliable picture of groundwater conditions at the Site. The model indicated that 350 gpm would be sufficient to support the IBWC's reconstruction of the American Canal. *See* Arcadis Groundwater Dewatering Estimate and Figures (Exhibits D-68, -69, -70).

Brian Hansen, a hydrogeologist with 23 years' experience, reviewed the model and its results. *See generally* Direct Proffer of Brian Hansen, P.E. (Exhibit D-177); Expert Report of Brian Hansen (Exhibit D-170). He independently confirmed that the Arcadis model was appropriately constructed and that its 350 gpm estimate is reliable and consistent with known and/or generally-accepted assumptions about the Site. Consequently, Jeffrey Zelikson concluded that a 350 gpm system would be used although Mr. Zelikson accounted for any uncertainty by including in his decision tree the possibility that a larger 1,200 gpm system might be needed for a short time. *See* Supplemental Report of Zelikson and White, p. 6 (Exhibit D-171).

Relying on the MWH Report, the IBWC disagrees and instead argues that an 8,000 gpm treatment system is necessary even though MWH repeatedly cautioned against adopting its estimate.[4] The IBWC ignores the simple fact that the MWH Report was a conceptual design report that MWH expected to be followed by a preliminary design and presumably a final design. MWH Report, 4-8 (Exhibit D-4). The MWH Report admitted that the water volumes required for dewatering "could be significantly less if more accurate water volumes were known." *Id.* at 4-8, 9. The IBWC has never conducted the additional studies and tests that MWH recommended to refine what MWH admitted was a "preliminary estimate." *Id.*

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[4] To put such a system in perspective, it would be large enough to treat water for a city of nearly 100,000 people.

at 4-8. Nor has the IBWC considered the alternative construction dewatering methods proposed by MWH such as using sheet piles, coffer dams, grout curtains, slurry walls, freezing, and other low-water production alternatives. *Id.* at 4-8. MWH also suggested that an aquifer test be performed in order to obtain a more accurate estimate. *Id.* at 3-36. The IBWC has not performed this inexpensive test either. The IBWC simply puts more weight on the MWH Report than this conceptual planning document was ever intended (or expected) to bear.

The IBWC ignores another problem with the groundwater component of its claim. The main purpose of the canal reconstruction project is canal reconstruction, not cleanup of groundwater. Treatment of groundwater is merely a component of the project. Therefore, the IBWC has an obligation to alter the canal reconstruction if that results in a more cost-effective project. For example, it appears that the IBWC, and its experts, never considered whether it would be more cost-effective and sensible to dewater smaller 250-foot segments where necessary in order to cut the required treatment system (and costs) in half and save millions of dollars. Similarly, MWH itself suggested a series of construction alternatives such as sheet piles, slurry walls, freezing, and grout curtains be considered that would reduce the necessary dewatering in the event MWH's 8,000 gpm estimate proved to be correct. MWH Report, 4-8 (Exhibit D-4). The IBWC and its experts made no effort to analyze these potential alternatives and instead continue to rely on an old estimate described by its own designers as "preliminary" and based on "generalizations." *Id.* at 4-8; Exhibit D-004.0125.

The IBWC attempts to support its 8,000 gpm estimate claiming that its engineer, Gabriel Duran, gathered data during a recent study conducted in 2007 by the U.S. Army Corps of Engineers (the "USACOE Sheetpile Inspection") confirming the MWH estimate was accurate. *See* Hand Calculation by Gabriel Duran (Exhibit D-65). This is simply not true. Gabriel

Duran's reliance on the USACOE Sheetpile Inspection is incorrect in several respects. First, the USACOE project was not representative of Canal reconstruction work. It was conducted within a few feet of several major bodies of water, which meant the USACOE pumped up a fair part of the Rio Grande and obviously was going to pull up much more water than would ordinarily be the case along the Canal. In fact, the USACOE pumping was conducted literally in the Rio Grande River after the river itself was diverted. *See* Underseepage Analysis of the American Dam, p. 55 (Exhibit D-181). Second, Mr. Duran failed to calculate the correct dewatering field and consequently overstated the pumping rate. *See* Expert Report of Brian Hansen, p. 16 (Exhibit D-170). Mr. Duran also failed to note that the USACOE dropped the water table 6-7 feet below the bottom of the Canal while the IBWC would only have to drop the water table 5 feet (according to MWH) for reconstruction work, which again overstated the pumping rate. Therefore, Mr. Duran's interpretation of data from the USACOE Sheetpile Inspection is simply not helpful to estimate the volume of pumping that would be required to support the Canal reconstruction project.

The IBWC and its experts appear to maintain that to the extent the USACOE Sheetpile Inspection was not representative of most of the Canal, it nonetheless demonstrates that at least one area of the Canal is likely to require heavy dewatering. As noted above, there are numerous flaws in this assertion. Regardless, LECG's probabilistic analysis took this into account by recognizing that additional treatment might be needed while also recognizing that any heavy pumping would be very short-lived (i.e., less than a day) and could be addressed through common-sense engineering practices (MWH suggested a very long list of possible options) rather than building a massive system needed for a very short time.

The IBWC attempts to undermine ASARCO's estimate of 350 gpm via the November 25, 2007 report of Allen Medine. *See generally* Surrebuttal Report of Allen Medine (Exhibit D-184). Dr. Medine tries to demonstrate that Mr. Hansen's groundwater formula could generate an extraction rate as high as 2,337 gpm. Unfortunately, Dr. Medine has to exaggerate existing data to justify the values he uses to generate extreme results, which are still considerably less than 8,000 gpm. Even so, Messrs. Zelikson and Hansen both recognize that more than 350 gpm might be needed and LECG contemplated the possibility of additional capacity. *See* Supplemental Report of Zelikson and White, p. 6 (Exhibit D-171). Furthermore, Dr. Medine repeatedly suggests that Mr. Hansen, Arcadis, and MWH all incorrectly used low hydraulic conductivity values (the speed at which groundwater moves) when the available data clearly show all three conservatively overestimated the known hydraulic conductivity of the area and therefore overstated the amount of pumping needed. Dr. Medine's other criticisms of Mr. Hansen's report and the Arcadis groundwater model fall similarly short of the mark.

Therefore, the Court is presented with two vastly different estimates. ASARCO's estimate is transparent and was prepared to comply with an administrative order rather than litigation; it is based on recent sampling data; and it has been double-checked by a practicing hydrogeologic expert. The IBWC's estimate was heavily caveated by its own designer and was based on unknown formulas that cannot be verified. Between the two, this Court should adopt ASARCO's estimate as the only reliable estimate on which to rely.

2. The IBWC's Remedy Utilizing a Dewatering Rate of 8,000 gpm Does not Comply with CERCLA and the NCP

The IBWC's adoption of MWH's dewatering estimate does not comply with CERCLA and the National Contingency Plan ("NCP") and therefore the IBWC could not recover for the cost of such a system. *See, e.g., United States v. Hardage*, 750 F. Supp. 1460,

1481 (W.D. Okla. 1990) ("*Hardage I*") (concluding that EPA's costs were incurred in a manner inconsistent with both the procedural and/or substantive requirements of the NCP and therefore were not recoverable from such parties). When an agency has conducted the remedy selection process in a manner inconsistent with the NCP, the courts have ruled that the agency's costs associated with that improper process are not recoverable under CERCLA. *See*, *e.g.*, *Hardage I*, 750 F. Supp. at 1476-1482; *Washington State Dep't of Trans. v. Washington Natural Gas*, 59 F.3d 793, 805 (9th Cir. 1995) (states are subject to the same NCP requirements and standards as EPA when seeking cost recovery under CERCLA).

The NCP provides detailed procedures that an agency must comply with in its remedy selection process. 40 C.F.R. § 300.430. This process includes reviewing alternative remedial approaches and selecting the alternative that best achieves the NCP remedy selection criteria, as well as providing appropriate opportunities for public comment on EPA's selected remedy. 40 C.F.R. § 300.430(f).[5] Indeed, the courts have held that Congress intended that the remedy selection process under the NCP should serve as mandatory requirements "against which response actions would be judged appropriate or inappropriate in the first instance." *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1291-92 (D. Del 1987); *see also United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992) ("*Hardage II*") (the Agency has a mandatory statutory obligation to conduct the remedy selection process in a manner not inconsistent with the NCP). Additionally, the Fifth Circuit concluded in *Bell Petroleum* that EPA's failure to identify in the administrative record any legitimate public health purpose for a

[5] The NCP imposes substantive requirements for EPA decision-making involving CERCLA response actions. In particular, the remedial alternatives considered by EPA as part of the remedy selection process must be evaluated and compared on the basis of the following nine substantive NCP criteria: (1) overall protection of human health and environment; (2) compliance with applicable and relevant or appropriate requirements ("ARARs"); (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility, or volume through treatment; (5) short-term effectiveness; (6) implementability; (7) cost; (8) state acceptance; and (9) community acceptance. 40 C.F.R. §§ 300.430(e)(9)(iii), 300.430(f)(1).

proposed response action makes that action arbitrary, capricious and inconsistent with the NCP. *In re Bell Petroleum*, 3 F.3d 889, 906 (5th Cir. 1993). The IBWC failed to comply with the NCP remedy selection criteria in several ways.

At the outset, the IBWC failed to comply with the NCP's investigatory process. The IBWC has not conducted a Preliminary Assessment, a Remedial Investigation/Feasibility Study, or any other study mentioned in the NCP. All the IBWC has is the MWH "Conceptual Design" Report, which expressly contemplates a future "preliminary design" that presumably would be followed by a final design. MWH Report, 4-8 (Exhibit D-4). The MWH Report cautioned IBWC of the use of its calculated 8,000 gpm treatment rate and urged IBWC to conduct field studies to determine the accurate pump requirements. *Id.* The IBWC never bothered to perform these studies. Moreover, the IBWC failed to analyze any alternatives such as altering the construction schedule if heavy groundwater treatment proved to be necessary. The IBWC's reliance on the MWH Report seems misplaced given that MWH expressly stated that dewatering might not be the best solution: "Consequently, alternative methods could be considered in lieu of de-watering wells." MWH Report at 4-9 (Exhibit D-4). With so many caveats, it is doubtful that the MWH Report even proposed a remedy; it certainly does not satisfy the NCP's requirement that a thorough investigation and balanced consideration of different alternatives occur.

Public participation is another requirement of the NCP. This is not an empty gesture to the public; EPA has acknowledged the importance of satisfying the NCP's public participation requirements, stating that "[i]n order to ensure adequate minimum public participation at all sites across the nation, EPA maintains that the lead agency must comply with the community relations requirements specified in the NCP." 55 Fed. Reg. at 8769. The IBWC

has totally failed to meet the public participation requirement. The IBWC has not sought public comment on any phase of its proposed soil excavation and groundwater treatment system nor noticed the proposed remedy to the public and solicit comments from it.

Another requirement of the NCP is that a remedy be cost effective. 40 C.F.R. § 300.430(e)(9)(iii). The IBWC's proposed $23.9 million 8,000 gpm system spectacularly fails this requirement. Jeffrey Zelikson, based on many years of experience selecting remedies on behalf of the EPA, notes that the IBWC could simply alter its planned construction in the event that heavy groundwater pumping is actually required for any limited portion of the Canal. Alternatively, the IBWC could consider some of the options suggested by MWH to reduce the volume of dewatering. MWH Report, 4-8 (Exhibit D-4). MWH also suggested that alternatives to dewatering be considered. *Id.* at 4-9. The IBWC has done neither and cannot colorably argue that it has. Simply put, the IBWC presents no evidence that the dewatering it thinks it needs cannot be accomplished more cost effectively than by installation of an expensive water treatment system that cost more than the reconstruction project itself.

The IBWC proposes an expensive environmental remedy that is based on the conservative assumptions of a contractor hired to make a rough estimate of the cost of reconstruction work and not to perform an NCP-compliant review of feasible alternatives. Based on this record, the IBWC cannot now argue that it has made any effort to comply with the NCP. Therefore, the IBWC could not recover its costs for an 8,000 gpm treatment system.

3. Commercial/Industrial Cleanup Standards Should Apply to Commercial/Industrial Property Such as the IBWC Site

The Bankruptcy Code is "silent as to the manner in which contingent or unliquidated claims are to be estimated." *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982). *See also In re FV Steel & Wire Co.*, 372 B.R. 446, 452 (Bankr. E.D. Wis. 2007). Thus,

bankruptcy courts may estimate claims using "whatever method is best suited to the circumstances." *Addison v. Langston* (*In re Brints Cotton Mktg., Inc.*), 737 F.2d 1338, 1341 (5th Cir. 1984). *See also Bittner*, 691 F.2d at 135; *FV Steel*, 372 B.R. at 453 ("courts are given a great deal of judicial discretion in designing the procedures for a claim estimation proceeding, such that a judge can use 'whatever method is best suited to the circumstances.'").

Moreover, a bankruptcy court's estimation of the value of an unliquidated claim, including the method used to arrive at that valuation, "may be disturbed on appellate review only in the event of an abuse of discretion." *O'Neill v. Continental Airlines, Inc.* (*In re Continental Airlines*), 981 F.2d 1450, 1461 (5th Cir. 1993); *Brints Cotton*, 737 F.2d at 1341; *Bittner*, 691 F.2d at 136. The *Bittner* court described the abuse of discretion standard of review as "narrow" and indicated that "[t]he appellate court must defer to the congressional intent to accord wide latitude to the decisions of the tribunal in question." 691 F.2d at 136.

In a proceeding to estimate a CERCLA claim under bankruptcy, the court "must determine the appropriate remedy and which costs are recoverable by approximating the EPA decision-making process and applicable judicial review." *In re National Gypsum*, 1992 WL 426464, *1 (N.D. Tex. 1992). CERCLA requires a cost-effective remedy. 42 U.S.C. § 9621(a) and (b). Cost-effectiveness must be considered in light of CERCLA's requirement that the degree of cleanup remove the contaminant in order to assure protection of human health and the environment, even in the case of a future release. 42 U.S.C. § 9621(d). CERCLA contemplates that in some cases hazardous substances or other contaminants may remain onsite even after the completion of the cleanup. 42 U.S.C. § 9621(d)(2)(A). Thus, a cost-effective remedy might allow residual contamination to remain if the site is cleaned up to an appropriate standard. *Id.*

The IBWC contends that the appropriate standard for cleanup of metals-contaminated soil at the Site (some of which are located at the Field Office, others at the Island, and others might be excavated during Canal reconstruction) is the Texas residential standard. This would cost roughly $3.55 million. The IBWC argues that this is the necessary standard because any other standard, such as the industrial/commercial standard, would require that the IBWC accept a deed recordation, and the IBWC is not willing to encumber its property. As evidence of this requirement, IBWC cites to a letter from the TCEQ identifying the residential standard as the appropriate standard if IBWC would not accept a deed restriction. *See* 9/17/2007 Letter from TCEQ to IBWC (Exhibit D-66). As a threshold matter, the IBWC's desires must yield to the cleanup required by CERCLA and the NCP if the IBWC seeks to recover its costs pursuant to them. The IBWC's claim that its property must be cleaned to residential standards is unnecessary and only serves to inflate the IBWC's claim. The appropriate cleanup standard is industrial/commercial, and that cleanup would cost roughly $1.5 million. *See* Supplemental Report of Zelikson and White, p. 7 (Exhibit D-171).

Currently, the IBWC site is used for industrial/commercial purposes. Even if the Court assumed the IBWC was the proper decision-maker for selecting a remedy, the IBWC still must comply with CERCLA and the National Contingency Plan when selecting a remedy, and it could not recover costs for cleaning the Site to residential standards that have no relationship to the Site's actual use and are not necessary to protect workers at a commercial/industrial facility.

The IBWC cannot articulate any plans to put the Site to residential use anytime in the foreseeable future. Moreover, the site is currently zoned as "unrestricted manufacturing." ASARCO's expert, Jeffrey Zelikson, appropriately contends that the commercial/industrial standard better reflects the exposure scenario applicable to this site. It is highly doubtful that

EPA would propose to clean this heavily industrialized site to residential levels under circumstances where there is no realistic chance that the property would be put to residential use. Indeed, portions of the Site are prone to flooding and require constant maintenance work that renders residential use implausible at best, never mind that the Site is government property with a specific industrial use. Therefore, it simply is not necessary to clean the Site up to residential standards. In addition, imposing a residential standard would not be in keeping with the cost-effective remedy selection intended by CERCLA. Thus, the cost of doing so cannot be recovered under CERCLA.

B. The IBWC is a Potentially Responsible Party and is Liable for a Portion of the Costs.

1. Federal property owners are treated like any other potentially responsible party under CERCLA.

The IBWC site is a federally-owned site, and as such, is as subject to the requirements under CERCLA as any other non-governmental entity. CERCLA provides that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." 42 U.S.C. § 9620(a)(1). Thus, the IBWC is subject to liability under CERCLA using the same criteria as nongovernmental entities.

2. The IBWC is liable as a current owner of the site

Under CERCLA, an entity is liable when it is an owner or operator of a facility. 42 U.S.C. § 107(a)(1). The IBWC is the owner of the site and as such is liable as an owner. In the Fifth Circuit, CERCLA liability under section 9607(a)(1), "imposes strict liability on the current owners of any facility which releases or threatens to release a toxic substance." *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988). Such liability includes present owners of sites previously contaminated. *Id.*

3. The IBWC is liable as an Arranger

The Fifth Circuit analyzes arranger liability under CERCLA by looking to the definition of disposal. *See Tanglewood-East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988). Arranger liability attaches when an entity "arranged for" disposal. 42 U.S.C. § 9607(a)(3). The term "arranged for" is not defined in the statute, therefore courts have looked to the definition and interpretation of "disposal" under CERCLA for guidance. *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917,929 (5th Cir. 2000). In *Tanglewood*, the court examined both present owner liability and arranger liability under CERCLA. The site at issue involved a site that was previously used to treat wood. The subsequent owners of the property excavated and graded the site to prepare for a residential development. *Id.* at 1571. Not only did the court determine that current owners, regardless of whether they owned the property during the release, are strictly liable, but also found that arranger liability should be interpreted broadly. The court concluded that the term "disposal" includes "the placing of any . . . hazardous waste into or on any land. . ." As such, "those that move the waste about the site may fall within the terms of the provision." *Id.* at 1573.

The IBWC has moved soils at the Field Office site even after it knew from the MWH Report in 2002 that the soils contained metals. Gabriel Duran, an IBWC engineer, confirmed in his deposition that the IBWC has moved soil around the Site. Indeed, Mr. Duran confirmed that the IBWC has contaminated its property in various ways for decades. Likewise, ASARCO employee Thomas Klempel confirms that he too has witnessed the IBWC moving soil throughout the Site. Therefore, IBWC is not only the present owner of the site, which subjects it to CERCLA liability, the IBWC is also liable as an arranger.

Richard White analyzed all of these considerations and concluded that it would be appropriate and conservative to allocate a 10% share of liability to the IBWC for costs to be

incurred at the Site. *See* Expert Report of Zelikson and White, pp. 18-22 (Exhibit D-131). Mr. White's reaffirmed his analysis in his November 5, 2007 report. *See* Supplemental Report of Zelikson and White, p. 7 (Exhibit D-171).

C. The IBWC's Claim is Improperly Exaggerated in Other Respects[6]

1. The Proper Base Year for Calculating Costs is 2006.

The Government's experts assumed a 2008 base year in order to calculate their cost estimates. Section 502(b) of the Bankruptcy Code directs the court to determine the amount of disputed claims as of the date of the filing of the petition. 11 U.S.C. § 502(b) (requiring the court to determine the amount of claims "as of the date of the filing of the petition"). *See also Addison v. Langston* (*In re Brints Cotton Mktg., Inc.*), 737 F.2d 1338, 1342 (5th Cir. 1984). The basic purpose of this discounting practice is to "insure the relative equality of payment between claims that mature in the future and claims that can be paid on the date of bankruptcy." *CF&I Fabricators*, 150 F.3d at 1300. Environmental claims have been filed against ASARCO as well as various of its subsidiaries and other affiliates (collectively, "Debtors"), which filed for bankruptcy on various dates throughout 2005 and 2006. For the sake of uniformity and convenience, the Debtors directed their experts to calculate the claim amounts as of mid-2006 because that is when proofs of claim were filed. While using one year beyond the petition date should not unduly affect the amount of future claims, there is no justification for using 2008 as the base year, as the United States proposes. The Court should direct the Government to re-calculate its claims using a 2006 base year as ASARCO has done.

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[6] ASARCO has already addressed these issues in greater detail in Debtors' Omnibus Motion to Determine the Appropriate Base Year and Discount Rate For Reducing to Their Present Value Allowed Non-Personal Injury, Similarly Situated, Unsecured Claims That Will Mature in the Future (Docket No. 6183) (filed November 1, 2007), as well as in hearing testimony regarding other sites. This briefing is not meant to supplant or otherwise modify the relief sought in the already-filed motion.

2. The Proper Discount Rate is 7%.

The Government's application of a variable nominal discount rate is inappropriate for two fundamental reasons and results in a significant overstatement of future costs. First, EPA's use of a variable discount rate is inconsistent with the Agency's own guidance and that of the Office of Management and Budget ("OMB"). Based on EPA policy on the use of discount rates for Superfund cost analyses set forth in the preamble to the NCP, 55 Fed. Reg. 8666, 8722 (March 8, 1990), and in OSWER Directive 9355.3-20, "Revisions to Office of Management and Budget Circular A-94 on Guidelines and Discount Rates for Benefit-Cost Analysis" (EPA 1993), ASARCO's experts used a discount rate of 7% to calculate the present value of future response costs at the Site. *See* Expert Report of Jeffrey Zelikson and Richard Lane White at 36-37 (May 4, 2007), (Exhibit D-130).

The discount rate used by the IBWC is also inappropriate because in adopting a low discount rate IBWC essentially asks this Court to treat it differently than other creditors. The IBWC's stated rationale for adopting a low variable discount rate is to account for limitations on IBWC's ability to invest monies in the Superfund, which allegedly result in a lower rate of return. However, the courts have rejected the proposition that an agency may use a discount rate that is tailored to its own expected rate of return, emphasizing instead the importance of ensuring that "the discounted Claim is quantified similarly to, and will thus be treated on parity with other claims." *In re Mirant Corp.*, 332 B.R. 139, 158 (Bankr. N.D. Tex. 2005) (footnote omitted). This goal is only met if the same discount rate is applied to all claims that mature in the future. For this reason, the U.S. Courts of Appeal for the Sixth and Tenth Circuits denied the Pension Benefit Guaranty Corporation's request to use its own discount rate to reduce its claim for unfunded future benefits to present value. *PBGC v. Belfance* (*In re CSC Indus., Inc.*), 232 F.3d 505, 509 (6th Cir. 2000); *PBGC v. CF&I Fabricators of Utah, Inc.* (*In re*

CF&I Fabricators of Utah, Inc.), 150 F.3d 1293, 1301 (10th Cir. 1998). As the Tenth Circuit explained, "a cardinal rule that all claims within the same class must be treated alike" would be violated if a discount rate were applied only to the government and "not any other general unsecured creditors." 150 F.3d. at 1301. Here, ASARCO proposes to use the 7% discount rate, which has been identified by OMB as the average real pre-tax return generated by private sector investments and which has been adopted by EPA for purposes of Superfund future cost analyses. OMB Circular A-94, "Guidelines and Discount Rates for Cost Benefit Analysis of Federal Programs" (Oct. 29, 1992).[7] Accordingly, ASARCO requests that the Court reduce the government's claim to present value using a 7% discount rate.

V. CONCLUSION

For the foregoing reasons, this Court should credit LECG's estimate of $2,990,000 as the expected value the remediating the IBWC property and grant the IBWC an allowed general unsecured claim in the amount of $2,990,000.

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Respectfully submitted,

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[7] OMB affirmed in 2003 that the average rate of return to capital "remains near the 7 percent rate estimated in 1992." 68 Fed. Reg. 5491, 5522 (Feb. 3, 2003).

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